

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 01, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ROBERT ZACHARIAH OLMSTEAD,

No. 2:22-cv-00198-MKD

Plaintiff,

PROTECTIVE ORDER

vs.

ECF No. 20

UNION PACIFIC RAILROAD
COMPANY,

Defendant.

Before the Court is the parties' Stipulated Motion for a Protective Order,

ECF No. 20. The Court has reviewed the record and the motion and finds good cause to grant the motion.

Accordingly, **IT IS ORDERED:**

1. The Stipulated Motion for a Protective Order, **ECF No. 20**, is

GRANTED.

2. PURPOSES AND LIMITATIONS

a. Discovery in this action is likely to involve production of confidential, proprietary, or private information for which special protection may be

warranted. The parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket protection on all disclosures or responses to discovery, the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles, and it does not presumptively entitle parties to file confidential information under seal.

3. **“CONFIDENTIAL” MATERIAL**

a. “Confidential” material shall include the following documents and tangible things produced or otherwise exchanged: internal Union Pacific law enforcement agent reports, personnel information and/or hierarchy charts, reports or prior complaints containing the names and/or identifying information of potential non-parties.

4. **SCOPE**

a. The protections conferred by this agreement cover not only confidential material (as defined above), but also

- i. any information copied or extracted from confidential material;
- ii. all copies, excerpts, summaries, or compilations of confidential material; and

iii. any testimony, conversations, or presentations by parties or their counsel that might reveal confidential material.

However, the protections conferred by this agreement do not cover information that is in the public domain or becomes part of the public domain through trial or otherwise.

5. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

a. Basic Principles. A receiving party may use confidential material that is disclosed or produced by another party or by a non-party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Confidential material may be disclosed only to the categories of persons and under the conditions described in this agreement.

Confidential material must be stored and maintained by a receiving party at a location and in a secure manner that ensures that access is limited to the persons authorized under this agreement.

b. Disclosure of “CONFIDENTIAL” Information or Items: Unless otherwise ordered by the court or permitted in writing by the designating party, a receiving party may disclose any confidential material only to:

- i. the receiving party's counsel of record in this action, as well as employees of counsel to whom it is reasonably necessary to disclose the information for this litigation;

- ii. the officers, directors, and employees (including in house counsel) of the receiving party to whom disclosure is reasonably necessary for this litigation, unless the parties agree that a particular document or material produced is for Attorney’s Eyes Only and is so designated;
- iii. experts and consultants to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgments and Agreement to Be Bound” (Exhibit A);
- iv. the court, court personnel, and court reporters and their staff;
- v. copy or imaging services retained by counsel to assist in the duplication of confidential material, provided that counsel for the party retaining the copy or imaging service instructs the service not to disclose any confidential material to third parties and to immediately return all originals and copies of any confidential material;
- vi. during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of transcribed deposition testimony or exhibits

1 to depositions that reveal confidential material must be
2 separately bound by the court reporter and may not be disclosed
3 to anyone except as permitted under this agreement;

4 vii. the author or recipient of a document containing the
5 information or a custodian or other person who otherwise
6 possessed or knew the information.

7 c. Filing Confidential Material. Before filing confidential material or
8 discussing or referencing such material in court filings, the filing party
9 shall confer with the designating party, in accordance with Local Civil
10 Rule 5(g)(3)(A), to determine whether the designating party will remove
11 the confidential designation, whether the document can be redacted, or
12 whether a motion to seal or stipulation and proposed order is warranted.

13 During the meet and confer process, the designating party must identify
14 the basis for sealing the specific confidential information at issue, and the
15 filing party shall include this basis in its motion to seal, along with any
16 objection to sealing the information at issue. Local Civil Rule 5(g) sets
17 forth the procedures that must be followed and the standards that will be
18 applied when a party seeks permission from the court to file material
19 under seal. A party who seeks to maintain the confidentiality of its
20 information must satisfy the requirements of Local Civil Rule 5(g)(3)(B),

1 even if it is not the party filing the motion to seal. Failure to satisfy this
2 requirement will result in the motion to seal being denied, in accordance
3 with the strong presumption of public access to the Court's files.

4 6. **DESIGNATING PROTECTED MATERIAL**

5 a. Exercise of Restraint and Care in Designating Materials for
6 Protection. Each party or non-party that designates information or items
7 for protection under this agreement must take care to limit any such
8 designation to specific material that qualifies under the appropriate
9 standards. The designating party must designate for protection only those
10 parts of material, documents, items, or oral or written communications
11 that qualify, so that other portions of the material, documents, items, or
12 communications for which protection is not warranted are not swept
13 unjustifiably within the ambit of this agreement.

14 Mass, indiscriminate, or routinized designations are prohibited.

15 Designations that are shown to be clearly unjustified or that have been
16 made for an improper purpose (e.g., to unnecessarily encumber or delay
17 the case development process or to impose unnecessary expenses and
18 burdens on other parties) expose the designating party to sanctions.

19 If it comes to a designating party's attention that information or items
20 that it designated for protection do not qualify for protection, the

1 designating party must promptly notify all other parties that it is
2 withdrawing the mistaken designation.

3 b. Manner and Timing of Designations. Except as otherwise provided in
4 this agreement (see, e.g., second paragraph of section 5.2(b) below), or as
5 otherwise stipulated or ordered, disclosure or discovery material that
6 qualifies for protection under this agreement must be clearly so
7 designated before or when the material is disclosed or produced.

8 i. Information in documentary form: (e.g., paper or electronic
9 documents and deposition exhibits, but excluding transcripts of
10 depositions or other pretrial or trial proceedings), the
11 designating party must affix the word “CONFIDENTIAL” to
12 each page that contains confidential material. If only a portion
13 or portions of the material on a page qualifies for protection, the
14 producing party must clearly identify the protected portion(s)
15 (e.g., by making appropriate markings in the margins).

16 ii. Testimony given in deposition or in other pretrial proceedings:
17 the parties and any participating non-parties must identify on
18 the record, during the deposition or other pretrial proceeding,
19 all protected testimony, without prejudice to their right to so
20 designate other testimony after reviewing the transcript. Any

1 party or non-party may, within fifteen days after receiving the
2 transcript of the deposition or other pretrial proceeding,
3 designate portions of the transcript, or exhibits thereto, as
4 confidential. If a party or non-party desires to protect
5 confidential information at trial, the issue should be addressed
6 during the pre-trial conference.

7 iii. Other tangible items: the producing party must affix in a
8 prominent place on the exterior of the container or containers in
9 which the information or item is stored the word
10 “CONFIDENTIAL.” If only a portion or portions of the
11 information or item warrant protection, the producing party, to
12 the extent practicable, shall identify the protected portion(s).

13 c. Inadvertent Failures to Designate: If timely corrected, an inadvertent
14 failure to designate qualified information or items does not, standing
15 alone, waive the designating party’s right to secure protection under this
16 agreement for such material. Upon timely correction of a designation, the
17 receiving party must make reasonable efforts to ensure that the material
18 is treated in accordance with the provisions of this agreement.

19 7. CHALLENGING CONFIDENTIALITY DESIGNATIONS

1 a. Timing of Challenges. Any party or non-party may challenge a
2 designation of confidentiality at any time. Unless a prompt challenge to a
3 designating party's confidentiality designation is necessary to avoid
4 foreseeable, substantial unfairness, unnecessary economic burdens, or a
5 significant disruption or delay of the litigation, a party does not waive its
6 right to challenge a confidentiality designation by electing not to mount a
7 challenge promptly after the original designation is disclosed.

8 b. Meet and Confer. The parties must make every attempt to resolve any
9 dispute regarding confidential designations without court involvement.
10 Any motion regarding confidential designations or for a protective order
11 must include a certification, in the motion or in a declaration or affidavit,
12 that the movant has engaged in a good faith meet and confer conference
13 with other affected parties in an effort to resolve the dispute without court
14 action. The certification must list the date, manner, and participants to the
15 conference. A good faith effort to confer requires a face-to-face meeting
16 or a telephone conference.

17 c. Judicial Intervention. If the parties cannot resolve a challenge without
18 court intervention, the designating party may file and serve a motion to
19 retain confidentiality under Local Civil Rule 7 (and in compliance with
20 Local Civil Rule 5(g), if applicable). The burden of persuasion in any

such motion shall be on the designating party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose unnecessary expenses and burdens on other parties) may expose the challenging party to sanctions. All parties shall continue to maintain the material in question as confidential until the court rules on the challenge.

8. **PROTECTED MATERIAL SUBPOENAED OR ORDERED**

7 **PRODUCED IN OTHER LITIGATION**

8 If a party is served with a subpoena or a court order issued in other litigation
9 that compels disclosure of any information or items designated in this action as
10 "CONFIDENTIAL," that party must:

- 11 a. Promptly notify the designating party in writing and include a copy of
12 the subpoena or court order,
- 13 b. Promptly notify in writing the party who caused the subpoena or order
14 to issue in the other litigation that some or all of the material covered by
15 the subpoena or order is subject to agreement. Such notification shall
16 include a copy of this agreement; and
- 17 c. Cooperate with respect to all reasonable procedures sought to be
18 pursued by the designating party whose confidential material may be
19 affected.

20 9. **UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

1 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
2 confidential material to any person or in any circumstance not authorized under
3 this agreement, the receiving party must immediately (a) notify in writing the
4 designating party of the unauthorized disclosures, (b) use its best efforts to retrieve
5 all unauthorized copies of the protected material, (c) inform the person or persons
6 to whom unauthorized disclosures were made of all the terms of this agreement,
7 and (d) request that such person or persons execute the “Acknowledgment and
8 Agreement to Be Bound” that is attached hereto as Exhibit A.

9 10. INADVERTENT PRODUCTION OF PRIVILEGED OR
10 OTHERWISE PROTECTED MATERIAL

11 When a producing party gives notice to receiving parties that certain
12 inadvertently produced material is subject to a claim of privilege or other
13 protection, the obligations of the receiving parties are those set forth in Federal
14 Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify
15 whatever procedure may be established in an e-discovery order or agreement that
16 provides for production without prior privilege review. The parties agree to the
17 entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

18 11. NON TERMINATION AND RETURN OF DOCUMENTS

19 Within 60 days after the termination of this action, including all appeals,
20 each receiving party must return all confidential material to the producing party,

1 including all copies, extracts and summaries thereof. Alternatively, the parties may
2 agree upon appropriate methods of destruction.

3 Notwithstanding this provision, counsel are entitled to retain one archival
4 copy of all documents filed with the court, trial, deposition, and hearing transcripts,
5 correspondence, deposition and trial exhibits, expert reports, attorney work
6 product, and consultant and expert work product, even if such materials contain
7 confidential material.

8 The confidentiality obligations imposed by this order shall remain in effect
9 until a designating party agrees otherwise in writing or a court orders otherwise.

10 **IT IS SO ORDERED.** The District Court Executive is directed to file this
11 order and provide copies to counsel.

12 DATED May 1, 2023.

13 *s/Mary K. Dimke*
14 MARY K. DIMKE
15 UNITED STATES DISTRICT JUDGE
16
17
18
19
20